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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

ROBERT LaFONTAINE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

Does the language of the Railway Labor Act, 45 USC § 153 (q), preclude judicial review of constitutional due process violations?

II

Does the language of 45 USC § 153 (q) and of the agreement between the United Transportation Workers Union (UTU) and the Chesapeake and Ohio Railway Company (C&O) mandate the production of necessary witnesses and evidence by Public Law Boards and provide the subpoena power for their production?

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OPINIONS BELOW

The order of the Court of Appeals is unreported and is printed in the attached appendix at p.A1.

The order of the district Court is unreported and is printed in the attached appendix at p.A5.

The order of the Court of Appeals, previous appeal by Defendant, is unreported and is printed in the attached appendix at p.A8.

The first order of the District Court is unreported and is printed in the attached appendix at p.A10.

The orders of the Public Law Boards 120 and 120A are printed in the attached appendix at pgs.A17 and A20 respectively.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on December 15, 1982. (Appendix p.A1) This petition is therefore timely.

This Court's jurisdiction is invoked under 28 USC §1254 and Rule 19 of the Rules of this Court.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

45 USC § 153 First (q):

> "The court shall have jurisdiction to affirm the order of the division or set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's

jurisdiction, or for fraud or corruption by a member of the division making the order."

45 USC § 153 First (j):

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

45 USC § 153 First (k):

Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, that except as

provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided."

Agreement between C&O and UTU Section 8:

"The Special Board shall hold hearings on each claim or grievance submitted to it and due notice of the hearings shall be given. At such hearings the parties may be heard in person, by counsel, or by other authorized representatives as they may select. The parties may present, either orally or in writing, statements of fact, supporting evidence and data and argument as to their position with respect to each case being considered by the Special Board. The Special Board shall have authority to request the production of additional evidence from either party." (emphasis added)

Agreement between C&O and UTU Section 9:

"The Special Board shall make findings of fact and render an award on each case submitted to it, ..." (Agreeement, pp 3,4)

STATEMENT OF THE CASE

This case arises under the Railway Labor Act, 45 USC § 153, First and Second. Petitioner (Plaintiff) was discharged from his employment for participating in an altercation with a fellow employee. He was stabbed by his co-worker and suffered a serious wound.

Pursuant to Article 16; Discipline, of the labor agreement between the United Transportation Union (UTU) and The Chesapeake and Ohio Railway Company (C&O) a "trainmaster's hearing" was held. This trainmaster's hearing disciplined both participants in the altercation by dismissal. The contract agreement

provides for representation at the hearing by an official of the UTU. Both employees were represented simultaneously by the same union official. Midway through the trainmaster's hearing Plaintiff recognized the inherent conflict of interest of this representation. He asked and was granted permission by the trainmaster for the opportunity to question witnesses on his own. From this point forward in the hearing the union official, allegedly representing Plaintiff, assumed an antagonistic, prosecutorial attitude toward Plaintiff. This attitude was so apparent that it was necessary for the trainmaster to admonish him with regard to it. The trainmaster's hearing was transcribed.

In accord with a further agreement between the UTU and the C&O, under the aegis of the Railway Labor Act, a Public Law Board was

created. This PLB was established to hear appeals from employer decisions on labor grievances. The dismissal ordered by the trainmaster's hearing was appealed by the union to this board. The sole evidence considered at this PLB hearing was the transcribed record of the trainmaster's hearing. Plaintiff was not present at this hearing, he had received no notice, and was represented in absentia by a UTU officer. The PLB in its opinion, designated 120, upheld the dismissal.

Plaintiff appealed to the United States District Court for the Eastern District of Michigan, Southern Division. He asked a for a rehearing on the grounds that he had been denied fundamental due process; that the PLB had violated its own rules and procedures as outlined by statute and contract; and that

he had not received notice of the hearing. The District Court remanded to the PLB for rehearing "on the merits." (District Court order April 30, 1976 p.A10 Appendix)

Defendant appealed to the Sixth Circuit Court of Appeals. That Court upheld the District Court order.

Defendant petitioned the United States Supreme Court for review of the Appeals Court decision. The request for a writ of certiorari was denied.

The case was reheard by the PLB. Plaintiff, represented by counsel, asked the board to require the production of certain items of evidence and certain witnesses under Defendant's control. Plaintiff asserted that the evidence and testimony he asked to have produced would presumably directly contradict the evidence that the PLB had extracted from the transcript of the trainmaster's hearing.

The PLB denied the order to produce this requested evidence as immaterial. The Board again relied on the transcript of the trainmaster's hearing in which Plaintiff was so questionably represented and again upheld Plaintiff's dismissal. (PLB opinion 120A) (Appendix p.20)

Plaintiff appealed to the United States District Court for the Eastern District of Michigan, Southern Division. Plaintiff alleged a violation of due process by reason of the PLB's reliance on the transcript of a fundamentally unfair hearing and by reason of the PLB's violation of statutory rules and contractual regulations. The District Court recognized the unfairness of the trainmaster's hearing and wrote that "the proceeding was arguably tainted by dual representation." The Court also recognized, if by implication, its right to due process

review when it wrote: "It would have been unfair to base an opinion on the transcript without giving the Plaintiff the opportunity to submit additional evidence." (District Court Memo Opinion Nov. 8, 1982 p.A5 Appendix) The Court reinforced the notion of its right to due process review in the above Memorandum Opinion when it wrote: "The Plaintiff had a fair hearing, and the issue was lost." The District Court upheld the second PLB decision.

Plaintiff appealed this decision to the Sixth Circuit Court of Appeals. Plaintiff alleged due process denial by reason of fundamental unfairness and violation of statutory provisions. Plaintiff argued that the Sixth Circuit had authority to review on the basis of alleged due process denial. The Appeals Court upheld the lower Court order resting its decision on an interpretation of Union

Pacific Railroad v. Sheehan, 439 US 89 and read that decision as banning any review except for the statutorily enumerated reasons.

Plaintiff now seeks review of the Court of Appeals' decision and its order of December 15, 1983 denying Petitioner's appeal.

ARGUMENT

Petitioner, Robert LaFontaine, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the order entered December 15, 1983 in Case No. 82-1864, entitled Robert LaFontaine, Plaintiff-Appellant v. The Chesapeake and Ohio Railway Company, Defendant-Appellee and the order of that court denying Petitioner's appeal of a district court judgment.

An important question of federal law has been decided by the Sixth Circuit in a manner that is in conflict with applicable decisions

of this Court. Plaintiff in the instant case has been denied remedy on the basis of a literal, though mistaken, interpretation of this Court's opinion in Sheehan. The Court of Appeals recognized "that the Sheehan opinion is susceptible to several interpretations" (Opinion of 12/15/83, p. 2), (Appendix p.A1) it, however, chose to rest its decision on United Steelworkers of America Local 1913 v. Union R.R. Co., 648 F2d 905 (3d Cir. 1981). It read United Steelworkers and its parent Sheehan to mean that statutory limits placed on judicial review of Public Law Board decisions by federal courts precludes those courts from consideration of constitutional violations. Carried to its ultimate conclusion this interpretation would give Congress the right to amend the constitution by legislative fiat. Certainly, this is not the intention of the Sheehan opinion.

The Federal District Court of Vermont found Sheehan more consistent with the long standing assertion by this Court that interpretation of the constitution and of limitation on its granted rights is the sole prerogative of the federal judiciary. Marbury v. Madison,[1] 1 Cranch (1803) In Broth. of Maintenance of Way Employees v. St. Johnsbury & LaMoille County Railway, 512 F Supp 1079 (D Vermont, 1981) the District Court read Sheehan as denying review of a "wide range of purely legal questions" but leaving open the "entirely reasonable practice of the district courts of examining (PLB) decisions for violations of due process."

The Sixth Circuit's recognition of Sheehan's susceptibility to several interpretations and the well thought out opinion of the Vermont District Court diametrically opposed to the choice made by the Sixth

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[1] 512 F Supp 1084; In addition to the statutory bases for review, the Courts have long recognized the jurisdiction

(cont.)

of the district courts to review the proceedings of the NRAB (PLB) for instances of failure to provide due process to the parties to a dispute. (cites omitted) Sheehan is somewhat troubling in this connection since the Tenth Circuit held that the action of the NRAB challenged by the Plaintiff amounted to a violation of due process. The Supreme Court failed to recognize any scope of review beyond the statutory provisions and did not discuss the constitutional basis for Plaintiff's claim. Thus, a possible reading of Sheehan is that a claim that the NRAB failed to provide a due process may not be heard by the district court because unconstitutionality is not among the three narrow bases for review under 45 USC § 153 First (p). The better reading of the Sheehan opinion, however, is that it is largely directed at refuting the Tenth Circuit's suggestion that a wide range of purely legal questions might be open for review by the district court. Sheehan alone is not enough to put an end to the entirely reasonable practice of the district courts of examining NRAB decisions for violations of due process prior to the enforcement of an award. "In sum, this court has four possible bases for review of the NRAB award."

Circuit leaves Plaintiff in a peculiar position. His claim could be heard and a remedy provided in Vermont but he is without remedy in Michigan. This game of geographic roulette with Plaintiff's constitutional rights calls for an interpretation of the rules binding on all parties.

Plaintiff has suffered the loss of a property right on the basis of statutorily mandated procedures. That this loss could not be imposed upon him absent due process is beyond argument. The form of process due is provided by statute and by contract agreement under the aegis of that statutue. But the mere observance of that form cannot be equated with the substantive need for a meaningful hearing. The District Court recognized its right to review the findings of the PLB for violation of Plaintiff's due process: "It is unnecessary for this Court to become involved

in the legal thicket of whether a want of due process is an appealable issue. In this case there was no want of process that was due. The Plaintiff had a fair hearing, and the issue was lost." (Memorandum opinion Nov. 8, 1982 Eastern District of Michigan Southern Div.) (Appendix p.A5) Would the Court have entered this "legal thicket" if it had found that Plaintiff had not received the process due him? If a district court finds that a plaintiff has received adequate due process in a PLB hearing is an Appeals Court precluded from reviewing the lower court's holding on the basis of an interpretation of Sheehan?

In the instant case the issue of due process review presents itself in two ways. Plaintiff suffered a denial of due process on the basis of the PLB decision that rested entirely on a transcript "arguably tainted by dual representation." (Memo opinion 11/8/82 p. 1,2)

(Appendix p.A5) In fact this dual representation is beyond argument. Plaintiff was represented in the contractually organized, statutorily provided "Trainmaster's Hearing" by the same union officer who was simultaneously representing his attacker. (Plaintiff's brief in support of motion to exclude from evidence the transcript of the Trainmaster's hearing). This assertion was uncontroverted by Defendant and recognized as factual by the district court. Plaintiff was denied the right to a meaningful hearing before the PLB when the transcript of this hearing, tainted by dual representation, was the sole evidence upon which the PLB decision was based.

Secondly, the due process denial was compounded by the refusal of the PLB to order the production of evidence and testimony at the second PLB hearing whose function was to

hear Plaintiff's case "on the merits." (District Court order 4/30/76) (Appendix p.A10) Plaintiff's timely request for the forced production of pertinent evidence, pertinent since it would presumably directly contradict the evidence the PLB extracted from the tainted transcript and relied on, was rejected by the PLB as immaterial.

Plaintiff was denied due process in the original hearing on his dismissal. (Trainmaster's Hearing) The denial was compounded when the transcript of the original hearing was the only evidence presented at the first PLB hearing. The District Court, inferentially, accepted its right to review on due process grounds when it wrote that: "The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing" (Memo opinion 2/13/75, p. 3) (Appendix p.A11) and

when it ordered rehearing on the merits.The denial of due process was further compounded when Plaintiff was not permitted to present evidence crucial to his case, at the second PLB hearing.

During oral argument before the Sixth Circuit the Court asked counsel for the Defendant if he believed that the district court order for review on the merits was a valid one. Counsel answered in the affirmative. The Court then asked, parenthetically, if the Appeals Court was denied the right to review a permissible lower court order. This question, though not reflected in the Court's opinion except through its recognition of the several interpretations of Sheehan; the contrary opinion in the Vermont District; and the transcending question of the Judiciary's right of review of constitutional claims, makes weighty argument that a writ of certiorari should be granted.

CONCLUSION

The Sixth Circuit's literal interpretation of statutory language, 45 USC § 153 First (q), and of the Court's opinion in Sheehan raises an important question of federal law, of congressional power and of judicial review. Followed to a logical conclusion, a literal interpretation of Sheehan would grant Congress the right to take property without due process of law.

In Arnett v. Kennedy, 416 US 134, the Court addressed and thoroughly discussed the standard of due process review mandated when government action results in a taking of property. The standard that can be read from Arnett, predecessors and progeny, is a standard of constitutional not statutory review. An interpretation of a statute that grants Congress the power to deny judicial review of

a constitutional claim cries out for the Court's review.

For the above reasons, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 9, 1984

APPENDIX

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed December 15, 1983)

(Robert LaFontaine, Plaintiff-Appellant, v. The Chesapeake and Ohio Railway Company, Defendant-Appellee. No. 82-1864)

BEFORE: ENGEL and CONTIE, Circuit Judges; and POTTER, * District Judge.

PER CURIAM. Robert LaFontaine appeals the district court's judgment upholding the Public Law Board's (the Board's) decision that LaFontaine argues that the Board denied him procedural due process and did not comply with the procedural requirements of the Railway Labor Act. We affirm

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* The Honorable John W. Potter, United States District Court Judge for the Northern District of Ohio, sitting by disignation.

As to LaFontaine's procedural due process claims, we conclude that under the authority of Union Pacific R.R. Co. v. Sheehan, 439 US 89 (1978) (per curiam) and 45 USC § 153(q) this Court cannot entertain such a claim. Section 153(q) provides that the decisions of the Board are conclusive except in three situations: (1) when the Board fails to comply with the requirements of the Railway Labor Act; (2) when the Board exceeds its jurisdiction; and (3) when the Board's decision is tainted by the fraud or corruption of a member of the Board. As the Supreme Court has stated, "this statutory language means just what it says." Sheehan, 439 US at 93. In other words, §153(q) enumerates the only grounds upon which a decision of the Board can be attacked.

Although we recognize that the Sheehan opinion is susceptible to several

interpretations, we find that the best view of Sheehan is represented by United Steelworkers of America Local 1913 v. Union R.R. Co., 648 F2d 905 (3rd Cir. 1981). Where, as here, the Board considers and rejects a procedural due process claim, a court may not review that decision unless one of the three circumstances identified in §153(q) is present in the decision rejecting the due process claim. See id. at 911-12. Accordingly, we may not consider LaFontaine's procedural due process claim.

LaFontaine's second claim is that the Board failed to comply with the requirements of the Act when it declined to exercise its power to command the testimony of certain witnesses requested by LaFontaine. We find nothing in the Act which requires the Board to hear all testimony proffered by a party or to use its power to require the production of witnesses

whenever a party makes such a request. LaFontaine would, therefore, ask us to review what is essentially an evidentiary question. We conclude that the Board's decision not to call certain witnesses was not a failure to comply with the requirements of the Act and that any further inquiry into the propriety of this decision is forbidden under §153(q).

We find no error in the district court's judgment. The judgment is therefore AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed November 8, 1982)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Co., Defendant. No. 82-71055)

Cross-motions for summary judgment were taken under advisement at oral argument on October 7, 1982.

An altercation between the plaintiff and a fellow employee occurring on April 26, 1971, led to their discharge by the defendant railroad. The flow of litigation from that time until the present time is long and interesting, but there appears to be no good reason for reciting it here.

The principal issue raised by the complaint is whether the plaintiff had the kind of fair hearing he was entitled to before the Public Law Board (P.L.B.) pursuant to this Court's order of April 30, 1976. The plaintiff

asserts that he did not have a fair hearing for two principal reasons. One reason is that the Board was unfair in considering the transcript of the trainmaster's hearing. The other principal reason involves the Public Law Board's unwillingness to continue the proceedings to subpoena two witnesses at the plaintiff's request.

There was nothing unfair in considering the trainmaster's transcript of the original proceedings. Although the proceeding was arguably tainted by dual representation, it would be almost impossible for witnesses to fairly recall the surrounding circumstances in detail after such a long period of time. It would have been unfair to base an opinion on the transcript without giving the plaintiff the opportunity to submit additional evidence. Under the applicable statute in law, he did have the opportunity to submit

additional written material and was given the opportunity to, and did, testify. Furthermore, he was given the opportunity to, and did, make an offer of proof on what the witnesses would, in his opinion, testify.

It is unnecessary for this Court to become involved in the legal thicket of whether a want of due process is an appealable issue. In this case there was no want of process that was due. The plaintiff had a fair hearing, and the issue was lost.

The Court does not have jurisdiction to consider the merits of the plaiintiff's case de nevo.

An order will be entered granting the defendant's motion for summary judgment.

/s/ James P. Churchill
United States District Judge

Dated: November 8, 1982

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed April 18, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v. The Chesapeake and Ohio Railroad Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN, District Judge.*

The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In Cole v. Erie Lackawana Railway Co., 541 F2d 528 (1976), cert. denied, 433 US 914 (1977), this court held that actual notice of a hearing

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* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ORDER REMANDING CASE TO PUBLIC LAW BOARD

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 30, 1976)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Co., Defendant. No. 82-71055)

This matter having come on to be heard upon motion of the Plaintiff and the Court being fully informed in the premises:

IT IS HEREBY ORDERED that the decision of the Public Law Board 347 upholding Plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits.

ENTERED BY ORDER OF THE COURT
/s/ Hon. Fred W. Kaess
U.S. District Judge
For
Judge James P. Churchill

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v. The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

This is an action for review of an award made by a special grievance board following the firing of a railroad employee for assaulting another employee. The petition alleges that plaintiff was employed as a yardman in Detroit by defendant railroad. On April 26, 1971, he was involved in an altercation with a fellow employee, J.H. Flatt. Pursuant to railroad procedure, a hearing was held before the trainmaster shortly thereafter; plaintiff was found to be at fault and was discharged from service. A claim for back pay and reinstatement was taken before the Public Law Board #347

pursuant to procedure agreed to by defendant and Plaintiff's collective bargaining representataive, the United Transportation Union. The claim was denied on January 19, 1973.

Plaintiff prays that he be ordered reinstated with back pay, or in the alternative, that the Board's decision be vacated and the matter be remanded for a new hearing. The asserted basis for such relief is that the original hearing was procedurally unfair because the same union representative served both plaintiff and J.H. Flatt at the trainmaster's hearing; that the Public Law Board hearing was unfair in that the transcript of the earlier hearing should not have been relied upon by the Public Board because the trainmaster's hearing had been conducted in total disregard of the rules of evidence; and in that the plaintiff here did

not receive proper notice of the hearing. This last claim was raised only in plaintiff's brief; it does not appear in his complaint.

The defendant railroad has moved for summary judgment alleging lack of jurisdiction over the subject matter as well as failure to state a cause of action. These are both defenses which can be raised by motion to dismiss under [2] Rule 12(b), F.R.C.P. The Court will construe this motion for summary judgment as a motion to dismiss under Rule 12(b)(1) and 12(b)(6).

Defendant claims that jurisdiction to review awards of Special Adjustment Boards does not lie in the district courts. In Andrews v. Louisville & Nashville R. Co., 406 US 320 (1972), it was held that:

"A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent

judicial proceeding. Union Pacific R. Co. v. Price, 360 US 601 (1959)." 406 US at 325. To some extent that principal is modified by the terms of the statute under which Special Boards are created. 45 USC Section 153 provides for jurisdiction in the district court to enforce awards of such boards. The terms of awards may be set aside under the statue only if a party alleges that the order exceeds the scope of the Board's jurisdiction, that the Board failed to comply with statutory requirements, or for fraud or corruption by a member of the Board.

This suit is not for enforcement of an order; nor does it allege any of the three grounds which would put it properly before a district court if enforcement were the issue. Rather, the suit is to set aside an order because of procedural irregularities at both the trainmaster's hearing and the hearing

before tne Special Board. The statute does not authorize review for those purposes. There is, however, case law authority for review of Special Board Decisions where they are tainted rehearing by the Special Board on the grounds of lack of due notice. Under the terms of paragraph 8 of the agreement between the railroad and the union establishing the Special Board, each party to a claim before such Board may present evidence and statements of fact at the hearing before the Board. The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing.

Heretofore, that claim of lack of notice has only been raised in plaintiff's brief. The Court hereby grants plaintiff leave to file an amended complaint to include such a claim. If the amendment is filed within

twenty (20) days of the date of filing of this order, the order granting the motion to dismiss as to the notice claim will be denied. If no such amendment is filed within such time, the motion to dismiss will be granted.

/s/ James P. Churchill
United States District Judge

Dated: February 11, 1975

PUBLIC LAW BOARD 347
AWARD 120

(Members of the Board: JAMES BURKE, Organization Member and B.G. UPTON, Carrier Member)

(Parties to Dispute: United Transportation Union and the Chesapeake and Ohio Railway Company)

(Statement of Claim: Claim for reinstatement of Detroit Yardman R. LaFontaine to the full service of the carrier, and compensation for time lost since June 30, 1971)

The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the

parties were given due notice of hearing.

[2] Claimant was discharged from carrier's service, after investigation, charged with being at fault in an altercation with another employee in violation of rules 801 and 802. The claim is based on an allegation that claimant was not the agressor in the altercation and was only attempting to defend himself. A review of the transcript does not substantiate the claim. Claimant followed the other employee to his automobile, struck him with a lantern, and shouted obscenities at him.

Claimant had been accused of bad work on the job by the other employee. This was not cause to swing a lantern or shout obscenities at the other employee and follow him to his car parked in the opposite direction of

claimant's car.

AWARD: Claim Denied.

ORDER: This award is ordered effective forthwith.

/s/ Arthur W. Sempliner
Judge, Chairman and Neutral

/s/ B.G. Upton
Carrier Member

/s/ J.E. Burke
Organization Member

Dated: January 19, 1973

PUBLIC LAW BOARD 347
AWARD 120A

(Members of the Board: LARRY WOTASZAK, Organization Member; CHARLES J. SCHULER, Carrier Member)

(Judge Arthur W. Sempliner, Chairman and Neutral)

(Parties to Dispute: United Transportation Union and the Chesapeake and Ohio Railway Company)

(Statement of Claim: Claim for reinstatement of Detroit Yardman R. LaFontaine to the full service of the carrier, and compensation for time lost since June 30, 1971)

The Board, upon the whole record and all the evidence, finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute and the parties involved herein, and the parties were given due notice of hearing.

On January 19, 1973, Public Law Board 347 denied the claim for reinstatement of Yardman R. LaFontaine as per the copy of the award attached hereto and made a part hereof. On April 19, 1976, U.S. District Judge Fred W. Kaess issued an order as follows:

"It is hereby ordered that the decision of the Public Law Board 347 upholding plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits." The matter was appealed to the 6th Circuit and the following order issued:

"The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the

Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In Cole v. Erie Lackawana Railway Co., 541 F2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "For a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal."

Subsequently, certiorari was denied and the matter came on for hearing before the Public Law Board 347 on September 20, 1979. Claimant, Robert LaFontaine, was represented by Ronald Reosti, Reosti and Papakhian, the United Transportation Union having been relieved at the request of the claimant LaFontaine. Mr.

LaFontaine was present in person before the Public Law Board.

The memorandum opinion of U.S. District Judge James P. Churchill is attached, and made a part hereof. Counsel for the claimant has raised two issues as follows:

1. To exclude the transcript of the trainmaster's hearing, as the claimant was not properly represented by officers simultaneously representing claimant LaFontaine and Conductor Flatt. The board denied the position of counsel Reosti in that by virtue of the Railway Labor Act, as amended, a Public Law Board is essentially a review tribunal, and that the transcript had previously been admitted into the record. A review of the transcript indicates that claimant was represented by representatives of his choice, participated in the investigation to an unusual extent,

and appears to have been, interms of jailhouse legalese, perhaps the most knowledgeable person present.

2. A demand for certain witnesses to be produced. The board denied the demand, but allowed a proffer of proof as to what these witnesses could testify to the burden of producing the witnesses being on the claimant, these same witnesses having testified at the trainmaster's investigation.

Claimant LaFontaine was examined by his counsel, Ronald Reosti. A review of the transcript and the testimony of claimant LaFontaine would indicate claimant's testimony was less than reliable. It was further indicated that claimant thought he could direct his work and run the railroad better than his superiors who were charged with this responsibility. Claimant was

argumentative, and in going to his care purposely went out of his way to go near Flatt's car and a fight ensued. Conductor R. Sharron found claimant's gloves on Flatt's car, but not his lamp. Failure to find the lamp with the gloves, substantiates the testimony that the lamp was used to strike conductor Flatt. On Page 39 of the transcsript of the September 20, 1979 hearing of this board, claimant LaFontaine testified that he believes he discussed his case with the committee prior to the original hearing before Public Law Board 347. There was no new evidence presented to the board that will change the board's original denial, and the claim will therefore be denied.

AWARD: Claim Denied.

ORDER: This award is ordered effective forthwith.

/s/ Arthur W. Sempliner
Judge, Chairman and Neutral

/s/ Charles J. Schuler
Carrier Member

/s/ Larry Wotaszak
Organization Member

Dated: April 23, 1982